

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.494 OF 2004**

Abdul Malik Mhod. Hussein ...Petitioner
Vs.

Mrs. Zakiya Bano Abdul Malik
& Ors. ...Respondents

Shri S.M. Sabrad for the Petitioner.
Shri Niranjana Shimpi for the Respondent Nos.1 to 3.
Ms M.M. Deshmukh, A.P.P. for the State.

**CORAM : A. S. OKA, J.
DATE : OCTOBER 05, 2005.**

P.C.:

1. Heard the Advocate appearing for the Petitioner and Advocate appearing for the Respondent Nos.1 to 3. The challenge in this Petition under Article 227 of the Constitution of India is to the Judgment and Order dated 19th November, 2002 passed by the Additional Sessions Judge, Malegaon in Criminal Revision Application No.109 of 2001. The Petitioner is the husband of the Respondent No.1. The Respondent Nos.2 and 3 are the children of the Petitioner.

2. An Application was made by the Respondent Nos.1 to 3 herein for grant of monthly allowance by way of maintenance under section 125 of the Code of Criminal Procedure, 1973. One of the defence of the Petitioner was that there was a legal and valid Talaq between the Petitioner and the Respondent No.1 and in

view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Respondent No.1 was not entitled to claim monthly allowance under section 125 of the said Code of 1973. The learned Judicial Magistrate, First Class, Malegaon, partly allowed the said Application and directed the Petitioner to pay monthly allowance to the Respondent Nos.2 and 3 at the rate of Rs.500/- per month. The Application in so far as the Respondent No.1 is concerned was rejected. The learned Magistrate, accepted the case of the Petitioner that there was a talaq given by him to the Respondent No.1. Revision Applications were preferred by the Respondent Nos..1 to 3 as well as by the Petitioner for challenging the said order of the learned Magistrate. The Respondent Nos.1 to 3 filed Criminal Revision Application No.109 of 2001 and the present Petitioner filed Criminal Revision Application No.121 of 2001. The Revision Applications were decided by a common judgment. The learned Additional Sessions Judge, Malegaon dismissed the Revision Application filed by the Petitioner for challenging the order made in favour of the Respondent Nos.2 and 3. The learned Additional Sessions Judge partly allowed Criminal Revision Application No.109 of 2001 and directed the Petitioner to pay monthly allowance of Rs.500/- per month to the Respondent No.1

from the date of filing of the Revision Application. The learned Counsel appearing for the Petitioner fairly stated that the challenge in this Petition is confined to the order of maintenance passed in favour of the Respondent No.1 in Criminal Revision Application No.109 of 2001 and the Petitioner has been regularly paying monthly maintenance payable to the Respondent Nos.2 and 3 as directed by the learned Magistrate.

2. The learned Counsel for the Petitioner submitted that if the factum of talaq was proved, the learned Additional Sessions judge could not have entertained Application under section 125 of the Code of Criminal Procedure, 1973. He pointed out finding recorded in paragraph No.9 and submitted that finding of fact recorded by the learned Magistrate could not have been upset by the Revisional Court. The learned Advocate appearing for the Respondent Nos.1 to 3 submitted that even assuming that there was a valid talaq, the Application made by the Respondent No.1 could have been treated as Application under the said Act of 1986. He submitted that no interference is called for.

3. I have considered the submissions. The

learned Judicial Magistrate, First Class has elaborately dealt with the issue relating to talaq. The discussion relating to the said issue is found in paragraph Nos.15 to 23 of his judgment. On the basis of evidence on record, the learned Magistrate accepted the case of the Petitioner. While dealing with the said aspect the only finding recorded by the Revisional Court reads thus:

9. As far as case made out by Abdul Malik on the point of talaq is concerned, it is not supported and corroborated by cogent evidence on record, Giving talaq by oral pronouncement is not mechanical formality for ending the matrimonial relationship. The contention raised by Abdul Malik that he pronounced talaq to Zakiya Bano is not acceptable and probable. The alleged document of talaq-nama vide exhibit No.21 is not duly proved.

4. The perusal of the judgment of the learned Magistrate shows that the learned Magistrate has referred to oral and documentary evidence on record and thereafter has recorded a finding of fact. What

was before the learned Additional Sessions Judge was a Revision Application under section 397 of the said Code of 1973. Though in limited cases it is permissible to interfere with finding of fact in the Revision Application under section 397 of the said Code of 1973, surely interference could not have been made without considering the oral and documentary evidence on record and without appreciating the same. The learned Additional Sessions Judge has dealt with the issue only in three sentences whereas, there was elaborate discussion on the same issue by the learned Magistrate. In my view, the entire approach of the Revisional Court was erroneous. Considering the manner in which Revision Application has been dealt with, in my view, it is necessary to set aside the impugned order so far as it relates to Criminal Revision Application No.109 of 2001 is concerned. The Revision Application will be confined to only that part of the order of the learned Magistrate by which prayer made by the Respondent No.1 for grant of monthly allowance was rejected.

5. Hence, I pass the following order:

: O R D E R :

i) The impugned Judgment and Order dated

19th November, 2002 passed by the learned Additional Sessions Judge, Malegaon in Criminal Revision Application No.109 of 2001 is quashed and set aside and Criminal Revision Application No.109 of 2001 is restored. The rejection of the Criminal Revision Application No.121 of 2001 by the impugned order is confirmed.

- ii) The learned Additional Sessions Judge, Malegaon will hear and decide Criminal Revision Application No.109 of 2001 afresh in accordance in law in the light of the observations made in this judgment.
- iii) Parties are directed to appear before the learned Additional Sessions Judge on 14th November, 2005 at 11.00 a.m. for fixing schedule of hearing.
- iv) Considering the facts and circumstances of the case, the said Revision Application will be decided as expeditiously as possible.

- v) Rule is made partly absolute in above terms.
- vi) Parties and the concerned Court to act upon an authenticated copy of this order.

JUDGE